Protection of Human Rights or to an inter-sessional working group set up by the Commission for that purpose. The drafting process in the Commission and its subsidiary bodies generally took at least several years, and for the two Covenants even spanned two decades.

With the replacement in 2006 of the Commission on Human rights by the Human Rights Council, and of the Sub-Commission by an Advisory Council (see Chapter 6), it is now the Council that prepares the text of new instruments. The draft must then be formally adopted by the General Assembly following discussion, in particular by its Third Committee on Social, Humanitarian and Cultural Affairs.

Once a treaty is adopted by the General Assembly, usually by consensus, it is opened for signature and ratification by Member States. It enters into force after a specific number of instruments of ratification or accession have been deposited by Member States.

Box 15 Human rights jurisprudence

Human rights treaties and conventions are living instruments, constantly developed through the jurisprudence of courts and expert bodies responsible for monitoring the implementation of international and regional human rights instruments (see Chapter 5 on treaty bodies and Chapter 8 on regional human rights treaties and monitoring). These bodies have given international human rights norms dynamic interpretations, adapting their provisions to current circumstances. For instance, the prohibition of inhuman and degrading treatment and punishment under Article 3 of the EHCR (1950) was not initially meant to apply to minor forms of corporal punishment (such as those practised in British schools); however, in the course of adaptation of the Convention as a living instrument, the European Court of Human Rights has found that no form of corporal punishment is permitted under article 3. The Inter-American Court of Human Rights, the United Nations Human Rights Committee (see Chapter 5) and other UN treaty monitoring bodies arrived at the same conclusion. Similarly, the Human Rights Committee has found that the right to security of the person, guaranteed in article 9 of International Covenant on Civil and Political Rights (ICCPR) along with the right to liberty, was not intended to be narrowed down to mere formal loss of liberty: in a landmark decision (case of *Delgado Páez* v. *Colombia,* 195/1985), the Committee ruled that States may not ignore threats to the personal security of non-detained persons within their jurisdictions and are obliged to take reasonable and appropriate measures to protect them.

Further reading

– Database of jurisprudence emanating from the United Nations Treaty Bodies, http://juris.ohchr.org

A cartoon by Lebanese artist Stavro Jabra, as part of an exhibition entitled "Sketching Human Rights" in the Main Gallery of the Visitors' Lobby, at the United Nations Headquarters in New York. © AFP/Stan Honda

Chapter 4
May States restrict human rights?

Some human rights, such as the prohibition of torture and slavery, are absolute. The application of interrogation techniques amounting to torture as defined under Article 1 of the CAT – for instance electric shocks and other methods causing severe physical pain or mental suffering – is not justified on any grounds whatsoever, including to implement counter-terrorism measures or to prevent imminent terrorist attacks.

However, most human rights are not absolute and are therefore subject to certain restrictions, including through reservations, derogations and limitations. Further, the principle of progressive realization of rights means that the particular circumstances and capacity of each State must be taken into account in assessing whether that State has violated its human rights obligations. As such, while the core content of human rights is universal and some obligations have immediate effect, States enjoy a margin of discretion in implementing their obligations to respect, protect and fulfil human rights.

Limitation clauses

Many obligations to respect human rights are subject to so-called limitation clauses. For instance, the exercise of political freedoms, such as freedom of expression, assembly and association, carries with it duties and responsibilities and may, therefore, be subject to certain formalities, conditions, restrictions and penalties in the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of public health or morals, or the protection of the reputation or rights and freedoms of others. If people misuse their freedom of speech and freedom to participate in a demonstration, to incite racial or religious hatred, to promote war propaganda or to encourage others to commit crimes, governments have an obligation to interfere with the exercise of these freedoms in order to protect the human rights of others. Any interference, restriction or penalty must, however, be carried out in accordance with domestic law and must be necessary for achieving the respective aims and national interests in a democratic society. States must in any case demonstrate the necessity of applying such limitations, and take only those measures which are proportionate to the pursuance of the legitimate aims.[1]

Box 16 Limitation clauses: examples of jurisprudence

It is the task of international human rights bodies to assess on a case-by-case basis whether a particular form of interference serves a *legitimate purpose,* is based on a valid and foreseeable *domestic law*, and is *proportionate to the legitimate purpose.* The European Court of Human Rights, for instance, has interpreted the relevant limitation clauses in the ECHR in a way that on the one hand provides governments with a fairly broad margin of appreciation[2], while on the other hand requiring them to show a *pressing social need* in order to justify restrictions. For instance, the Court did not accept the argument given by the Irish Government that the general prohibition of homosexuality under Irish criminal law was necessary in a democratic society for the protection of public morals. In the absence of any comparable legislation in other European societies, the Court found that there was no pressing social need for such a far-reaching restriction of the right to privacy.

Derogation during a state of emergency

In exceptional circumstances, including armed conflict, rioting, natural disasters or other public emergencies that threaten the life of a nation, governments may take measures derogating from their human rights obligations, provided that the following conditions are met:[3]

1 See, for example, Article 19 of ICCPR.

2 The concept of margin of appreciation is most frequently applied by the European Court of Human Rights; however, other bodies including the Human Rights Committee, have also referred to similar concepts, including a "margin of discretion".

3 See Article 4 of ICCPR.

- A state of emergency, which threatens the life of the nation, must be officially declared.
- The specific measures derogating from an international treaty must be officially notified to the competent international organizations and other States Parties.
- Derogation is permissible only to the extent strictly required by the situation.
- The derogation must be lifted as soon as the situation permits.
- The rights subject to derogation must not be among those that admit no derogation[4] (see Box 17 and Chapter 9).

Box 17 Rights, freedoms and prohibitions that are not subject to derogation even in times of public emergency which threatens the life of the nation

Under Article 4 of the ICCPR

- Right to life
- Prohibition of torture, or cruel, inhuman or degrading treatment or punishment
- Prohibition of slavery and servitude
- Prohibition of detention for debt
- Prohibition of retroactive criminal laws
- Right to recognition as a person before the law
- Freedom of thought, conscience, religion and belief

Under Article 15 of the ECHR

- Right to life, except in respect of deaths resulting from lawful acts of war
- Prohibition of torture, or inhuman or degrading treatment or punishment
- Prohibition of slavery and servitude
- Prohibition of retroactive criminal laws

Under Article 27 of the American Convention on Human Rights

- Right to legal personality
- Right to life
- Right to humane treatment
- Prohibition of slavery and servitude
- Prohibition of retroactive criminal laws
- Freedom of conscience and religion

4 See also CAT, Article 2(2) and CED, Article 1(2).

- Right to nationality
- Right to participate in government
- Right to a name
- Rights of the family
- Rights of the child
- Right to the judicial guarantees required to protect the aforementioned rights

Under the African Charter on Human and Peoples' Rights

- The Charter does not contain a derogation provision; however, States Parties may derogate from certain rights in times of emergency.[5]

Under Article 4 of the Arab Charter on Human Rights

- Right to life
- Prohibition of torture, or cruel, degrading, humiliating or inhuman treatment
- Prohibition of medical or scientific experimentation, or trafficking of human organs
- Prohibition of slavery, servitude and trafficking in human beings
- Right to fair trial before a competent, independent and impartial court, including legal aid for persons without the requisite financial resources
- Right of persons deprived of liberty to have the legality of detention determined by a competent court (habeas corpus)
- Prohibition of retroactive crimes and penalties
- Prohibition of imprisonment for failing to pay a contractual debt
- Prohibition of criminal prosecution twice for the same offence
- Right of persons deprived of their liberty to be treated with humanity
- Right to be recognized before the law
- Prohibition of unlawfully preventing persons from leaving or residing in any country
- Right to seek political asylum
- Right to nationality
- Right to freedom of thought, conscience and religion, subject to limitations as prescribed by law
- Right to the judicial guarantees required for the protection of the aforementioned rights

5 Max Planck Encyclopedia of Public International Law, African Charter on Human and Peoples' Rights (1981).

Box 18 General comment No. 29 (2001) of the Human Rights Committee on derogations during a state of emergency

The Human Rights Committee, as the supervisory body of ICCPR, may issue general comments to assist States Parties in the interpretation of ICCPR provisions. In its general comment No. 29 on states of emergency, the Human Rights Committee stressed that the list of non-derogable rights contained in article 4(2) of the ICCPR is not necessarily exhaustive. Certain rights or elements of rights not listed in article 4(2) of the ICCPR, such as the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person, or the prohibition of propaganda for war and advocacy of hatred, cannot be made subject to lawful derogation. The Human Rights Committee also took the view that procedural safeguards, including judicial guarantees, may never be made subject to measures that would circumvent the protection of non-derogable rights. Moreover, it held that "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency".

Box 19 Excerpts from a report by the UN Special Rapporteur on Human rights and states of exception, Mr L. Despouy, to the IPU Symposium on Parliament, Guardian of Human Rights, Budapest, 1993

"Experience shows that it is highly desirable for the provisions governing states of emergency to have the rank of constitutional measures. Most legislations explicitly provide for this, although others set it out in an indirect manner by laying down that 'no authority may assume the legislative functions on the grounds of the existence of a state of emergency'."

Reservations

In certain cases, States may issue unilateral statements upon signature, ratification, acceptance, approval of, or accession to a treaty with the purpose of excluding or modifying the legal effect of certain provisions of the treaty for the State making the statement. Such statements may be entitled "reservation", "declaration", "understanding", "interpretative declaration" or "interpretative statement".

Article 19 of the 1969 Vienna Convention on the Law of Treaties specifies that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation, unless:

- the reservation is prohibited by the treaty;

- the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- in cases not falling under the above two categories, the reservation is incompatible with the object and purpose of the treaty.

Where a treaty is silent on reservations and a reservation is formulated and subsequently circulated, the States concerned have 12 months to object to the reservation, beginning on the date of the depositary notification or the date on which the State expressed its consent to be bound by the treaty, whichever is later (see Article 20(5) of the Vienna Convention on the Law of Treaties 1969).

A State may, unless the treaty stipulates otherwise, withdraw its reservation or objection to a reservation, either completely or partially, at any time. A reservation that is found by a treaty monitoring body to be incompatible with the object and purpose of the relevant treaty is invalid. Consequently, the treaty shall be applied by the State concerned without such reservation (see Human Rights Committee, general comment No. 24, CCPR/C/21/Rev.1/Add.6, paragraph 18) (see also Chapter 10).

Further reading

- Human Rights Committee, general comment No. 29 on states of emergency (CCPR/C/21/Rev.1/Add.11)
- Human Rights Committee, general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant
- Siracusa Principles on the limitation and derogation of provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex)